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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

JOHN LAING et al., Plaintiffs and Appellants, v. GUAM ECONOMIC DEVELOPMENT AND COMMERCE AUTHORITY et al., Defendants and Respondents.	B206680 (Los Angeles County Super. Ct. No. BC360563)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ernest M. Hiroshige, Judge. Affirmed.

Costa Abrams & Coate, LLP, Charles M. Coate, Darius Anthony Vosylius and Theresa E. Johnson for Plaintiffs and Appellants.

Calvo & Clark, Arne D. Wagner and Jay D. Trickett for Defendant and Respondent Guam Economic Development and Commerce Authority.

Robbins, Kaplan, Miller & Ciresi LLP, Michael J. Plonsker, Cherly S. Chang; Lujan Aguigui & Perez and Ignacio C. Aguigui for Defendants and Respondents Guam Visitors Bureau and Gerry Perez.

Appellants John Laing, Rigel USA, Inc., and Guam Motion Pictures Company appeal from a judgment of dismissal that was entered after the court sustained without leave to amend demurrers to their first amended complaint. They also appeal from a subsequent order awarding attorney's fees to respondent Guam Economic Development and Commerce Authority based on its contract with the plaintiffs. The action was dismissed because appellants did not comply with the claim-filing requirements of Guam's Government Claims Act, 5 G.C.A. section 6101 (claims act, or act) before commencing their action. We conclude that the trial court ruled properly in sustaining the demurrers and did not abuse its discretion in denying leave to amend. We also conclude that the trial court properly awarded attorney's fees pursuant to section 1717 of the Civil Code[1] and did not abuse its discretion in awarding the sum of $57,209. Therefore, we affirm.

FACTS

1. Introduction

John Laing, Rigel USA, Inc. (Rigel), and Guam Motion Pictures Company (GMPC) sued three defendants – respondents Guam Economic Development and Commerce Authority (GEDCA), Guam Visitors Bureau (GVB), and their representative Gerry Perez (Perez). As stated above, the principal reason why the trial court dismissed the action is appellants' failure to comply with the claim-filing requirements of Guam's Government Claims Act, 5 G.C.A. section 6101 before commencing their action. This fact does not appear to be in dispute. Nowhere do appellants allege that they did file a government claim. Section 6106(a) of Guam's claims act bars actions unless a claim is filed within 18 months "from the date the claim arose." Section 6106(b) bars actions unless they are commenced within 18 months from the time the notice of the claim's rejection was served or within 24 months after the claim was filed and the government

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[1] Hereinafter we refer to Civil Code section 1717 as section 1717.

does not reject the claim. The procedure for filing a claim is set out in section 6201 and 6202. Section 6208 allows a claimant to "institute an action in contract or tort, for money damages only, against . . . the specific agency involved . . . provided that" the claimant has been notified that his claim has been rejected or six months have elapsed since the filing of the claim.

2. Factual allegations in the original complaint

Appellants' original complaint contains the following allegations: The defendants were eager to have the plaintiffs (who are film producers) make a movie in Guam and promised financial incentives if the plaintiffs would do so. Plaintiffs ran out of money; defendants failed to come through with financial help, and then defendants changed the original deal by insisting on recourse financing. Plaintiffs lost the picture through foreclosure and sued.

The trial court sustained demurrers to the original complaint on grounds of noncompliance with Guam's government claims act. The court also ruled that defendant Perez came within the claims act because the complaint alleged he had acted within the course of his employment. Although appellants received 20 days leave to amend, the court ordered that they could do so for only two specific purposes: 1) "[T]o allege that [appellants] have complied with the Government Claims Act and/or" 2) to allege "that immunity has been waived."

3. Factual allegations in the first amended complaint

The unverified first amended complaint contains four causes of action: rescission, fraud (negligent misrepresentation), declaratory relief, and breach of oral contract. Appellants did not seek leave of court before filing, even though they added allegations some of which were beyond the limits of the trial court's order.

While the gist of most of the allegations that follow also appears in the original complaint, the following do not: 1) references to tax breaks and refunds, 2) a change in

one cause of action from fraud to negligent misrepresentation and 3) a new paragraph alleging, without factual support, that Perez "may" have been acting outside the scope of his agency and authority. The allegations pertinent to this appeal are set out below.

John Laing resides in Los Angeles. He is president of Rigel USA, Inc., which is a California corporation that produces and distributes motion pictures. Guam Motion Pictures Company (GMPC) is a Guam corporation and its principal place of business is on that island. Rigel USA established Guam Motion Pictures Company with guidance and "explicit instructions" from the defendants to create the entity for one purpose: to produce a picture entitled "Max Havoc: Curse of the Dragon" ("Max Havoc") in Guam.

Guam Visitors Bureau (GVB) is a Guam public corporation based in Guam with the purpose of developing tourist trade there. Guam Economic Development and Commerce Authority (GEDCA) is a Guam public corporation whose purpose is to develop economic activity on Guam through venture capital funding to foster business development.[2]

Defendant Gerry Perez is the President of the Guam Visitors Bureau and the former administrator of GEDCA.

Paragraph 8 alleges that each of the defendants, including Perez "was the agent, servant, employee, partner, joint venturer and/or franchisee of each of the remaining defendants herein, and was at all times acting within the course and scope of said agency, service, employment, partnership, joint venture and/or francise, except when such Defendant may have acted in excess of their official capacities."

Plaintiffs claim that their claims are excluded from Guam's government claims act, that immunity under Guam's claims act has been waived, and/or that they have substantially complied with the claims act's requirements. The amended complaint

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[2] Public corporations are specifically included within the coverage of Guam's Government Claims Act. (See section 6102.) What's more, defendants GEDCA and GVB are specifically named in section 6102.

quotes several provisions of the claims act, and also asserts that the act does not apply to any claim pertaining to any tax refund.[3]

First cause of action - rescission

All of the appellants sued GEDCA for rescission of a written contract pursuant to which appellants would guarantee the sum of $800,000 as collateral for GEDCA's pledge to secure a loan from Comerica Bank in connection with "Max Havoc." A copy of the guarantee is attached to the first amended complaint. It is signed by all plaintiffs and by GEDCA. Paragraph 20 provides that the guaranty "is made in Guam and shall be governed by and construed and interpreted in accordance with the laws of Guam."

Appellants claim that GEDCA obtained their consent to the guarantee through duress and menace because of the following: in the fall of 2003, a Guam government official got in touch with Laing and the director of "Max Havoc" to seek their help in establishing a film commission and viable film industry on Guam and induce them to film "Max Havoc" there. Plaintiffs were told that the Governor of Guam had issued a mandate to create jobs on Guam and to attract investment by establishing a film commission and offering incentives (including, according to the first amended complaint, tax subsidies and/or tax refunds) to make films there. Plaintiffs were told the Guam government would do "everything in its power, including providing access to venture

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[3] Appellants cite section 6104 to the effect that "This Chapter shall not apply to any claim pertaining to any tax refund . . . ." The complaint also contains the following cites: Section 6105, [T]he government of Guam waives immunity from suit . . . [¶] a) for all expenses incurred in reliance upon a contract to which the Government of Guam is a party, but if the contract has been substantially completed, expectation damages may be awarded;" and

"b) for claims in tort, arising from the negligent acts of its employees acting for and at the direction of the government of Guam . . . ."

Section 6208 provides that a claimant "may institute an action in contract or tort, for money damages only, against the government of Guam in the event the claim is made against a line agency, or against the specific agency involved in the event the claim is made against an autonomous agency, in the Superior Court of Guam . . . ."

capital through GEDCA" to induce plaintiffs to move the production of their movie to Guam and have the first film produced under this governor's mandate. Appellants allege they met with the governor and with Gerry Perez. Perez and the governor told appellant Laing that if plaintiffs would shift production to Guam, the government would subsidize directly or indirectly a great majority portion of the budget in the form of investment and tax incentives paid through GEDCA.

These incentives would consist of non-recourse loans and bank guarantees from GEDCA, discounts from local vendors, rebates, and other "production tax refunds and/or tax subsidies" as well as a $125,000 contract from the Guam Visitors Bureau to produce three commercials to promote tourism. They also promised refunds of sales tax and a waiver of all sales taxes on any goods and services purchased or rendered on Guam akin to what many U.S. states issue in the form of rebates.

Based on these promises, without which production in Guam would have been economically unfeasible, plaintiffs decided to film "Max Havoc" in Guam.

Appellants allege that the promised subsidies approximating $3 million never materialized and that respondents never made a direct investment despite continuing assurances that they would do so once the paperwork was filled out. Meanwhile, respondents insisted that filming had to be completed by early June, 2004.

In reliance on these statements, plaintiffs started production in May, 2004, on Guam, using a crew of people who traveled from California to take advantage of the subsidies. By May/June 2004, Rigel and GMPC were verging on financial collapse because they had been advancing so much of their own money to complete principal photography. The film was still unfinished by October 2004, and that is when Perez came to Los Angeles and for the first time demanded that any budget contributions be in the form of a recourse loan, not an investment, and that the loan would require a corporate and personal guarantee by Laing. Perez allegedly "threatened" Rigel that if plaintiffs did not agree to guarantee this "loan," no money would be forthcoming from the defendants. The appellants felt they had no choice but to execute the personal

guaranty. Appellants asked for rescission of the guaranty and prayed for their expenses including attorney's fees.

Second cause of action - negligent misrepresentation

Rigel and GMPC named all of the respondents for this tort. They alleged that the defendants misrepresented and concealed material facts without having reasonable grounds for believing them to be true, especially with respect to the loan as opposed to promised subsidies and nonrecourse financing.

For the first time, Rigel and GMPC included a paragraph (No. 26) to the effect that "in the alternative" Gerry Perez, in making the negligent representations, "may be found to have acted outside the scope of his authority as a representative of GBV and/or GEDCA and to such extent is individually liable . . . ."

Third cause of action - declaratory relief

GMPC sued GEDCA for declaratory relief claiming that under California law, it is entitled to declaratory relief to interpret the loan and security agreement between Comerica Bank and Plaintiff GMPC, which rights and remedies are governed by California law.[4] GMPC alleged that its lender foreclosed on the motion picture and asserted that an actual controversy exists between plaintiff and defendant. GMPC contended that the foreclosure and sale eliminated all entitlement of GEDCA to be subrogated to all rights and remedies of Comerica Bank against GMPC and asked for a declaration to determine whether a foreclosure on the picture eliminated all entitlement of plaintiff to be subrogated to all rights and remedies of Comerica Bank against GMPC.

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[4] We cannot find in the record any details about this loan agreement.

Fourth cause of action - breach of oral contract

The final cause of action was by GMPC against Guam Visitors Bureau. GMPC alleged that in 2004, Guam Visitors Bureau entered into an oral agreement with GMPC pursuant to which GMPC would produce three commercial television public service announcements with a celebrity spokesperson to promote Guam tourism. The fee would be $125,000. GMPC hired Carmen Electra in California as the spokesperson and produced the three commercials. Even though it broadcast at least the first commercial, GVB paid only $22,500 to the plaintiff against plaintiff's fee.

4. Demurrer sustained without leave to amend

GEDCA's demurrer to the first amended complaint was based primarily on the plaintiffs' failure to comply with the claims act, as well as uncertainty with respect to each cause of action. Guam Visitors Bureau and Perez based their demurrer to the second and fourth claims principally on plaintiffs' failure to comply with the claims act as well as their failure to exhaust administrative remedies. The parties later filed joinders in one another's demurrers.

The trial court ruled that plaintiffs had failed to allege necessary compliance with the claims act. In addition, the court found that the action was not one for a tax refund, and thus was not exempt from the claims act per section 6104. Furthermore, the court ruled that the new, alternative allegation that Perez "may" have acted outside his authority violated its previous ruling requiring a motion for leave to amend if the plaintiffs wanted to include subjects other than compliance with the claims act. As a result, the court sustained all demurrers without leave to amend. Judgment of dismissal followed on March 10, 2008. Plaintiffs filed a timely notice of appeal.

5. *The court awards attorney's fees under section 1717*

In May 2008, GEDCA filed a motion for $114,418.25 attorney's fees, under the attorney's fees provision of the guaranty and section 1717. The court rejected plaintiffs' objections to an award of fees and found GEDCA to be the prevailing party on the contract. However, the court concluded that the amount GEDCA claimed was excessive and awarded $57,209, one-half the amount requested.

Plaintiffs separately appealed from the attorney's fees order. On plaintiffs' subsequent motion, we consolidated the appeals.

DISCUSSION

1. *Standard of review*

We engage in a de novo review of a sustained demurrer, based on a reasonable interpretation of the complaint which assumes the truth of all properly pleaded and judicially noticed facts. (*Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1089, fn. 10; *Vaughn v. LJ Internat. Inc.* (2009) 174 Cal.App.4th 213, 218-219 (*Vaughn*).) "The plaintiff bears the burden of proving the trial court erred in sustaining the demurrer." (*Vaughn* at p. 219.) It is an abuse of discretion to sustain a demurrer without leave to amend if there is a reasonable probability the defect can be cured by amendment. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

We review the trial court's decision to deny leave to amend for an abuse of discretion. (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 459.) It is "'an abuse of discretion to sustain a demurrer without leave to amend if there is a reasonable possibility that the defect can be cured by amendment. [Citations.]'" (*Scott v. City of Indian Wells* (1972) 6 Cal.3d 541, 549.) "When any court makes an order sustaining a demurrer without leave to amend the question as to whether or not such court abused its discretion in making such an order is open on appeal even though no request to amend such pleading was made." (Code Civ. Proc., § 472c, subd. (a).) Thus, an "abuse of discretion is reviewable on appeal 'even in the absence of a

request for leave to amend' [citations], and even if the plaintiff does not claim on appeal that the trial court abused its discretion in sustaining a demurrer without leave to amend. [Citation.]" (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 971.) The appellant bears the burden of proving the trial court erred in sustaining the demurrer or abused its discretion in denying leave to amend. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Coutin v. Lucas* (1990) 220 Cal.App.3d 1016, 1020; *V.C. v. Los Angeles Unified School Dist.* (2006) 139 Cal.App.4th 499, 506-507.)

Awarding attorney's fees to the prevailing party is mandatory, but a trial court has wide discretion in determining who is the prevailing party under section 1717, and we will not disturb the trial court's determination absent "a manifest abuse of discretion, a prejudicial error of law, or necessary findings not supported by substantial evidence." (*Yield Dynamics, Inc. v. TEA Systems Corp*. (2007) 154 Cal.App.4th 547, 577; *Silver Creek, LLC v. Blackrock Realty Advisors, Inc*. (2009) 173 Cal.App.4th 1533, 1539.)

2. *The court properly sustained the demurrers*

a. Even if the court had engaged in a choice of law analysis, Guam Law applies

i. Governmental interest analysis

Appellants contend that the trial court applied Guam law to this case without performing a choice of law analysis under which, ostensibly, the claims act would not apply. They assert error in the trial court's failure to apply a "governmental interest analysis" which they argue would preclude application of the claims act. That analysis resolves substantive choice of law issues by balancing the interests of the involved states and parties. (See *Tucci v. Club Mediterranee* (2001) 89 Cal.App.4th 180, 188-194.) In this connection, the following passage from *Nedlloyd Lines B.V. v. Superior Court* (1992) 3 Cal.4th 459 (*Nedlloyd Lines*), is instructive:

"Briefly restated, the proper approach under Restatement section 187, subdivision (2) is for the court first to determine either: (1) whether the chosen state has a substantial

relationship to the parties or their transaction, or (2) whether there is any other reasonable basis for the parties' choice of law. If neither of these tests is met, that is the end of the inquiry, and the court need not enforce the parties' choice of law. If, however, either test is met, the court must next determine whether the chosen state's law is contrary to a *fundamental* policy of California. If there is no such conflict, the court shall enforce the parties' choice of law. If, however, there is a fundamental conflict with California law, the court must then determine whether California has a "materially greater interest than the chosen state in the determination of the particular issue . . . ." (Rest., § 187, subd. (2).) If California has a materially greater interest than the chosen state, the choice of law shall not be enforced, for the obvious reason that in such circumstance we will decline to enforce a law contrary to this state's fundamental policy . . . ." (*Nedlloyd Lines, supra,* 3 Cal.4th at p. 466.)

"There may also be instances when the chosen state has a materially greater interest in the matter than does California, but enforcement of the law of the chosen state would lead to a result contrary to a fundamental policy of California. In some such cases, enforcement of the law of the chosen state may be appropriate despite California's policy to the contrary. (*S. A. Empresa, etc. v. Boeing Co*. [(1981)] 641 F.2d 746, 749.) Careful consideration, however, of California's policy and the other state's interest would be required. . . ." (*Nedlloyd Lines, supra,* 3 Cal.4th at p. 466, fn. 6.)

The instant case involves the interpretation of Guam law and its application to Guam public corporations in connection with a contract to be performed on Guam and a continuing guaranty calling for Guam law to apply. Even with the involvement of a California citizen, California cannot have a materially greater interest than Guam. Guam has a substantial relationship to the parties as well as their transaction. Further, Guam's law is not contrary to a fundamental policy of California. If anything, Guam's law squares with the purposes of California's Government claims act. (Gov. Code §§ 810 et seq.) Guam has a material interest in shielding its public corporations from claims for which Guam has not waived sovereign immunity and claims for which its public

corporations have not been promptly placed on notice with a concomitant ability to investigate. *In City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 744, the court said that the "primary purposes" of the Government Claims Act was "facilitating the investigation of disputes and their settlement without trial if appropriate. [Citations.]" In *V.C. v. Los Angeles Unified School Dist*., *supra*, 139 Cal.App.4th 499, the court said, "The purposes of the claim filing requirement are: '(1) to give notice to the public entity so it will have a timely opportunity to investigate the claim and determine the facts; and (2) to give the public entity an opportunity to settle meritorious claims thereby avoiding unnecessary lawsuits.' [Citations.]" (*Id*. at pp. 507-508.)

It may be true that California wishes to protect its citizens from torts committed by out of state persons - in this case, negligent misrepresentation. But under the facts alleged in this amended complaint, that policy is not materially greater than the policy underlying Guam's claims act.

Had the court engaged in this choice of law analysis, the result would not have changed.

ii. Choice of law clause in the continuing guaranty

With respect to the rescission claim, as GEDCA points out, appellants and GEDCA selected which law to apply to the continuing guaranty, and they chose Guam law. Our Supreme Court has said that this choice of law clause should be honored unless its application would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue. (*Nedlloyd Lines, supra*, 3 Cal.4th at p. 465.) There were ample and reasonable bases for the parties' choice of law in the continuing guaranty.

iii. Procedure v. substance

Appellants insist that Guam's government claims act is procedural, not substantive. We disagree.

Vaughn, supra, 174 Cal.App.4th 213, dealt with a British Virgin Islands requirement that derivative actions be approved by their court, and we found the law to

be substantive. Our division wrote that the real inquiry "must be directed to the question whether appellant's right to bring this action involves no more than compliance with procedural requirements extraneous to the substance of their claim, or whether it concerns the very nature and quality of their substantive rights, powers and privileges as stockholders . . . ." (*Id*. at p. 220.) "[W]e view standing to sue as a substantive right. Although prefiling requirements which grant or deny standing might be accurately described as 'hybrids,' involving both procedure and substance, they must in our view be considered substantive for purposes of the present dispute." (*Id*. at p. 222.) We also observed, in *Cohen v. DIRECTV, Inc*. (2009) 178 Cal.App.4th 966, 981, that "Standing, generally speaking, is a matter addressed to the trial court's jurisdiction because a plaintiff who lacks standing cannot state a valid cause of action." As *Vaughn* reasoned, pre-filing requirements that grant or deny standing involve both procedure and substance, giving them a hybrid quality. However, for purposes of choice of law analysis, such requirements are substantive, because standing to sue is "a substantive right." (*Vaughn, supra*, 174 Cal.App.4th at p. 222.) That is why we found that the British Virgin Islands statute requiring leave by the High Court was not procedural. (*Ibid*.) That holding applies in the instant appeal. If anything, Guam's position is stronger than LJ International's because this appeal deals with the government's right to refrain from being sued.

We have observed that the internal affairs doctrine protects private corporations from "conflicting demands." (*Vaughn, supra*, 174 Cal.App.4th at p. 223, quoting *Edgar v. MITE Corp*. (1982) 457 U.S. 624, 645.) The doctrine is "salutary" to the free market system. Business must have "confidence that a predictable legal framework will govern the relationship between investors and the corporation." (*Vaughn*, at p. 224, quoting *CTS Corp. v. Dynamics Corp. of America* (1987) 481 U.S. 69, 90.) Thus, if plaintiffs were somehow to prove that GEDCA and GVB were private entities, the internal affairs doctrine would still require the appellants to comply with any Guam statute imposing a prefiling condition precedent. The right of Guam's government to regulate lawsuits

against their public corporations is as strong, if not stronger. Just as a plaintiff suing a private entity must comply with the requirements of the business entity's home jurisdiction, as *Vaughn* holds, a plaintiff suing a public corporation like GEDCA and GVB must comply with Guam's administrative claim requirements. If California law controlled respondents' amenability to suit and their right to rely on the Guam claims statute, then respondents would be at the sufferance of the laws of every state and territory depending only on where a plaintiff happens to live. The chilling effect on commerce caused by such a law is as evident as its illogic. Guam Motion Picture Company is a Guam corporation with its principal place of business there. Not only did all of the appellants do business there, but the business they conducted forms the subject matter of the action below. Appellants knew they were dealing with Guam entities, and appellants agreed in writing that Guam law would govern their relationship with at least one of them, GEDCA. Guam's requirement that one submit an administrative claim is substantive in nature, and appellants' failure to comply bars their present suit.

b. No prejudice from the trial court's failure to perform choice of law analysis

i. Respondents fall within the ambit of the claims act

Section 6105 of the claims act delineates matters for which the government may be sued. This provision responds to authority contained in Guam's Organic Act and codified at Title 48, United States Code, section 1421a. That enactment provides in part that the island's government may, "with the consent of the legislature evidenced by enacted law," be sued on contracts and for torts committed incident to governmental activity.[5] Enacted under this provision (although not entirely corresponding to it),

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[5] The full text of the section states: "Guam is declared to be an unincorporated territory of the United States and the capital and seat of government thereof shall be located at the city of Agana, Guam. The government of Guam shall have the powers set forth in this chapter, shall have power to sue by such name, and, with the consent of the legislature evidenced by enacted law, may be sued upon any contract entered into with respect to, or any tort committed incident to, the exercise by the government of Guam of

section 6105 states: "Pursuant to Section 3 of the Guam Organic Act, the Government of Guam hereby waives immunity from suit, but only as hereinafter provided: [¶] (a) for all expenses incurred in reliance upon a contract to which the Government of Guam is a party, but if the contract has been substantially completed, expectation damages may be awarded; [¶] (b) for claims in tort, arising from the negligent acts of its employees acting for and at the direction of the government of Guam, even though occurring in an activity to which private persons do not engage. . . . [¶] (c) The Government of Guam shall not be liable for claims arising from an exercise of discretion in making policy."

Appellants contend that the government claims act does not apply to their case, because neither GEDCA nor the GVB is subject to it. The text of the claims act refutes this contention. As alleged in the first amended complaint as well as in the statute itself, both GEDCA and the GVB are Guam public corporations. Section 6102, entitled "Coverage of Chapter," provides that the claims act applies to the entire government and states, "No government agency, whether denominated as a line department, an agency or a public corporation, is excluded from the scope of this Chapter." The section goes on to state that references in the claims act to an "'autonomous agency' shall include public corporations," specifically including GEDCA and GVB. Section 6103(a) then defines the Government of Guam for purposes of the claims act as including "all agencies, departments, instrumentalities public corporations and other entities of the government . . . ."

ii. Appellants Laing and Rigel USA's claims and GMPC's tort claim

While it is true that the trial court did not perform a choice of law analysis, we do not find this omission prejudicial, even if it was error. Guam took steps to limit suits against its public corporations like GEDCA and GVB, and the only law pertinent to that

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any of its lawful powers. The government of Guam shall consist of three branches, executive, legislative, and judicial, and its relations with the Federal Government in all matters not the program responsibility of another Federal department or agency, shall be under the general administrative supervision of the Secretary of the Interior."

subject would be Guam's. California law cannot educate us on what limitations Guam's legislature imposed in this regard, with the result that there is no relevant California law to "choose." In particular, what California's Tort Claims Act (Gov. Code §§ 810 et seq.) mandates with respect to suits against this state's agencies for rescission and declaratory relief cannot impact Guam's claims act. California cannot compel Guam to treat its agencies in any particular way when Guam has exercised the authority Congress gave it in the Organic Act to legislate otherwise. If California attempted to do so, serious constitutional problems could arise. Guam is a United States territory. Article IV, section 3 of the United States Constitution gives Congress, not California, the "power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ." (U.S. Const. art., IV, § 3.) In the Organic Act, Congress vested Guam's legislature with plenary authority to permit or limit suits against Guam's government. (48 U.S.C. §1421a.)

Redding Rancheria v. Superior Court (2001) 88 Cal.App.4th 384, 387 is instructive. The case involved the ability of California to assert jurisdiction over Indian tribes. The court said, "we find nothing in California's organic act (Act for Admission of the State of California, 9 Stat. 452), or in any other federal law, which grants California any special power over Indian tribes." Moreover, the court noted that "tribal immunity is a matter of federal law and is not subject to diminution by the States." (*Kiowa Tribe of Oklahoma v. Mfg. Technologies, Inc*. (1998) 523 U.S. 754, 756) Analogizing these decisions to Guam's situation suggests that the immunity enjoyed by this country's territories - which has as its source an act of Congress -- is also not subject to diminution by the states. Congress, not the California Legislature, is the entity that controls the extent to which states may exercise jurisdiction over territories. (Cf. *Long v. Chemehuevi Indian Reservation* (1981) 115 Cal.App.3d 853, 857.)

iii. Appellant GMPC's claim for breach of contract

Guam law controls with respect to GMPC. GMPC is a Guam corporation, and that fact does not change even though its owner(s) may be California citizens. We are unaware of a case holding that the residence or citizenship of a corporation's shareholders trumps the corporation's place of incorporation.

GMPC's claim for breach of oral contract with GVB has no California connection. A Guam corporation contracted with a Guam public corporation. The contract was performed at least substantially on the island of Guam, because the three commercials were shot there. This all but eliminates California's interest in protecting GMPC. The trial court properly sustained the demurrers against GMPC.

iv. The rescission and declaratory relief claims.

Appellants do not argue that Guam's claims act does not cover their rescission and declaratory relief claims. "A point not presented in a party's opening brief is deemed to have been abandoned or waived." (*Humes v. MarGil Ventures, Inc*. (1985) 174 Cal.App.3d 486, 493.) They only argue that rescission and declaratory relief claims are exempt from California's Claims Act. Since California law does not apply, we need not address the argument.

c. The doctrine of Sovereign immunity, if relevant, bars appellants' action

Appellants argue that GEDCA and GVB do not enjoy sovereign immunity, as *Guam Economic Development Authority v. Island Equipment Company, Inc*. (Guam Terr. May 28, 1998, No. CVA 97-030) 1998 WL 270280 (*Island Equipment*) held, and therefore cannot be subject to the Guam claims act, which functions in connection with a waiver of such immunity. The argument is beside the point. It is true that the *Island Equipment* court said, "In the present case, GEDA and GVB are non-governmental entities and the doctrine of sovereign immunity does not apply." (*Id.* at [¶] 9.) But the stubborn fact remains that "the Guam Legislature restricted suits against GED[C]A and

GVB by making the Government Claims Act applicable to those public corporations . . . ." (*Ibid*.)

The Supreme Court of Guam confirmed the claims act's coverage of GEDCA and GVB in *Island Equipment, supra,* 1998 WL 270280. The court noted that although GEDCA and GVB did not independently possess sovereign immunity, the claims act applied to them by legislative enactment. (*Id*. at [¶] 9.) This holding makes sense in the context of a theoretical claim of immunity by virtue of the claim's act's coverage. There would be no reason for the court to engage in this analysis if GEDCA and GVB were private corporations. A later case, *Guam Radio Services, Inc. v. Guam Economic Development Authority* (Guam Terr. Jan. 12, 2000, No. CVA 98-037) 2000 WL 32130, referred to this observation and explained how GEDCA "is subject to the Government Claims Act." (*Id*. at [¶] 21; see also [¶] 22.)

Appellants' argument to the contrary relies primarily on two Ninth Circuit cases[6] concerning the GVB. Neither reaches the precise point and neither deals with the Government Claims Act. The first case, *Laguana v. Guam Visitors Bureau* (9th Cir. 1984) 725 F.2d 519, held that Guam Visitors Bureau was "an unusual entity" (*id*. at p. 520) and was not a public employer or an instrumentality of the government. In so holding, the court accorded deference to the district court's decision below. (*Ibid*.) Significant to this case, *Laguana* failed to hold that the Guam Visitors Bureau is not a public corporation.

The second case, *Bordallo v. Reyes* (9th Cir.1985) 763 F.2d 1098, addressed the Governor's power to appoint directors of the Visitors Bureau. It held that following its reconstitution as a public corporation, GVB was not an instrumentality of the executive branch. The court relied on legislative language and history that showed that unlike certain other public corporations, Guam Visitors Bureau "was not an instrumentality of

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[6] Decisions from the federal courts of appeals "provide persuasive rather than binding authority. [Citations.]" *People v. Bradford* (1997) 15 Cal.4th 1229, 1292.

the government." (*Id.* at p. 1103; see also *Carlson v. Perez* (Guam Terr. Aug. 28, 2007, Nos. CVA05-012 & CVA05-013) 2007 WL 2460764 [GEDCA not an instrumentality].) Again, the court did not say that GVB was not a public corporation.

We conclude that a Guam entity can be a public corporation without being an instrumentality of the government. Public corporations are defined and enumerated as such under the Guam claims act, and our research discloses nothing that says that an entity must be an instrumentality of the government in order to be, or remain, a public corporation. Moreover, a passage in the *Island Equipment Co.* decision states, "GEDA (now known as GEDCA), as well, should be treated as a public corporation, but not an instrumentality of the government." (*Island Equipment*, *supra*, 1998 WL 270280 at ¶ 9.)

In neither of the cases appellants cite was the status of GEDCA or GVB at issue, and the courts did not examine their status. Neither case holds that the respondents are not public corporations. Neither contradicts the fact that both the claims act and the Guam Supreme Court recognize and declare that the claims act covers GEDC and GVB.

We therefore conclude that the Guam claims act applies to the GVB, GEDCA, and to Perez, the individual respondent who acted as their agent.

d. Plaintiffs did not pursue a tax refund case that would have been exempt from Guam's claims act

Appellants claim that they had no obligation to submit a claim because their action constituted a "tax refund" case to which Guam's claims act does not apply. (See § 6104.) We disagree. Appellants never alleged that anyone assessed or collected any taxes from them or that they paid any taxes to anyone on Guam, much less to GEDCA. Appellants do not allege that they actually paid a production tax or a sales tax.

Moreover, it appears Guam does not impose production taxes or sales taxes. Guam Finance and Taxation Code 11 GCA §§ 1101 et seq does not mention either tax. Furthermore, if appellants did pay such a levy, they would not have paid it to GEDCA, because that entity does not assess, collect, or refund taxes. Guam's Department of

Revenue and Taxation performs that function. (11 GCA § 1103.) While courts treat demurrers as admitting all material facts properly pleaded, "we may disregard allegations which are contrary to law or to a fact of which judicial notice may be taken [Citation.]" *V.C. v. Los Angeles Unified School Dist*., *supra*, 139 Cal.App.4th at p. 506; *Blank v. Kirwan, supra*, 39 Cal.3d 311, 318.[7]

3. *The court did not abuse its discretion in preventing appellants from pleading that alternatively, Perez acted outside the scope of his employment or agency*

Appellants' original complaint alleged that Perez was an agent of GEDCA and GVB and was acting within the course and scope of his agency and employment. When the trial court sustained the demurrer to the original complaint, the judge granted leave to amend "to allow plaintiffs to allege facts that they have complied with the Government Claims Act and/or immunity has been waived." The trial judge said that appellants would have to bring a separate motion for leave to amend if they wanted to amend outside the scope of the order.

Without making such a motion, appellants filed an amended complaint that added a paragraph containing a new allegation that Perez "may be found to have acted outside the scope of his authority as a representative of GFB and/or GEDCA . . . . Appellants did not drop their original allegation in paragraph 6 to the effect that Perez is president of the GVB and GEDCA's former administrator. The court was displeased and used

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[7] Assuming appellants can circumvent Guam's claims statute in this regard, they still would have had to comply with Guam's administrative claim requirements for tax refund suits, which they have not done. (See, e.g. 11 GCA § 26108, requiring plaintiffs in suits for refund of business privilege taxes to name the Tax Commissioner and allege that the department "erroneously or illegally assessed or collected" the taxes; 11 GCA § 24601, 24906-24910, requiring written application to the Director of Revenue and Taxation before any refund of property taxes; 48 USC 1421i(h), to the effect that suits for recovery of Guam territorial income taxes are subject to the same statutory requirements as are applicable to suits against the United States with respect to the United States income tax.)

appellants' violation of its order as an independent ground for sustaining Perez's demurrer without leave to amend.

Appellants argue that the trial court's restrictions on amending the pleading were overly restrictive and sustaining the demurrer without leave to amend constituted an abuse of discretion. We disagree for several reasons. First, appellants failed to cure the defect. All they claimed was that Perez "may" have acted outside his authorities. Appellants offered virtually no factual support for this allegation, either in their briefs or during oral argument. Second, the trial judge had a right to manage this case, and Code of Civil Procedure section 128 gives the court broad powers in this regard. Third, appellants' new allegation contradicted their original complaint as well as an earlier portion of their amended complaint. In *Sanai v. Saltz* (2009) 170 Cal.App.4th 746 (*Sanai*), the trial court was found to have acted within its discretion in denying leave to amend. "[T]he trial court has discretion to deny leave to amend when the proposed amendment omits or contradicts harmful facts pleaded in a prior pleading unless a showing is made of mistake or other sufficient excuse for changing the facts. Absent such a showing, the proposed pleading may be treated as a sham. [Citations.] 'The well-established rule is that a proposed amendment which contradicts allegations in an earlier pleading will not be allowed in the absence of "very satisfactory evidence" upon which it is "clearly shown that the earlier pleading is the result of mistake or inadvertence."' [citing *American Advertising & Sales Co. v. Mid-Western Transport* (1984) 152 Cal.App.3d 875, 879] ['"Where a verified complaint contains allegations destructive of a cause of action, the defect cannot be cured in subsequently filed pleadings by simply omitting such allegations without explanation." [Citations.] "In such a case the original defect infects the subsequent pleading so as to render it vulnerable to a demurrer." [Citation.] However, we have also made it clear that "a party should be allowed to correct a pleading by omitting an allegation which, it appears, was made as the result of mistake or inadvertence."'].) Ordinarily a court will permit an amendment to cure a mistake or inadvertent allegation, but it 'is not required to accept an amended complaint

that is not filed in good faith, is frivolous or sham.' [citing *American Advertising & Sales Co*., at p. 878.]" (*Sanai*, *supra*, 170 Cal.App.4th 746, 768-69.)

Appellants first alleged that Perez's actions were within the scope of his authority as a "representative" of the public corporations. Appellants then learned Perez was protected by sovereign immunity and appellants' failure to comply with the claims act. Appellants then tried to allege the exact opposite, although the record is bereft of supporting facts. The facts they do plead established that Perez was an agent of GEDCA and GVB. Appellants do not argue mistake or inadvertence as required under *Sanai*. Instead, they argue that the contrary allegations in the original complaint were "merely boilerplate" and that *Redding Rancheria v. Superior Court*, *supra*, 88 Cal.4th at p. 390, permits what they have done. It does not. *Redding Rancheria*, also a sovereign immunity case, is distinguishable. There the court hypothetically would have permitted an amendment adding individual employees of the immune Indian tribe with allegations that they were acting outside the scope of their employment. However, unlike this situation, there were no prior contradictory allegations. The trial court did not abuse its discretion in denying appellants leave to amend.

4. The trial court properly awarded attorney's fees to GEDCA

a. GEDCA was the prevailing party

Paragraph 19 of the Continuing Guaranty contains a clause (paragraph 19) that "Guarantors agree to pay reasonable attorney's fees and all other costs and expenses which may be incurred by GEDCA in the enforcement of this Guaranty, whether or not suit is filed thereon." Based on that paragraph, the trial court awarded attorney's fees after sustaining GEDCA's demurrer without leave to amend.

Appellants attack the trial court's award of attorney's fees first on the ground that section 1717 does not cover actions dismissed for lack of subject matter jurisdiction. Appellants also claim that GEDCA did not prevail because still pending in Guam is a separate lawsuit that GEDCA has filed with respect to the same continuing guaranty.

Third, appellants assert that GEDCA is only entitled to reasonable attorney's fees for actions brought to "enforce" the guaranty.

Section 1717, subdivision (a) supports an award of attorney's fees to the "party prevailing on the contract." Section 1717, subdivision (b)(1) defines the term as "the party who recovered a greater relief in the action on a contract." The trial court, considering only the contract claims "without reference to the success or failure of noncontract claims," decides who "recovered a greater relief." (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 874.) No one can dispute that GEDCA obtained the "greater relief." The outcome was "purely good news for one party and bad news for the other." (*Id*. at p. 876.) In *Winick Corp. v. Safeco Insurance Co.* (1986) 187 Cal.App.3d 1502, 1508, the court observed that the most any civil defendant "ordinarily can hope to achieve is to have the plaintiff's claim thrown out completely. This is exactly what happened here. . . . In any practical sense of the word, the defendant 'prevailed.'"

In *Christensen v. Dewor Developments* (1983) 33 Cal.3d 778, 780, 787 the plaintiff filed a lawsuit over "admittedly arbitrable disputes, for the asserted purpose of discovering his opponent's legal theories" and pursued it through successive demurrers, abandoning (dismissing without prejudice) it only a day before a scheduled hearing on the adequacy of his amended complaint." The trial court held that the plaintiff waived his right to arbitrate. Our Supreme Court ruled that the defendant was entitled to attorney's fees under section 1717. The courts of appeal have followed this opinion by consistently finding parties to have prevailed following many types of dismissals. These include:

- dismissals due to lack of personal jurisdiction, *Profit Concepts Mangement Inc. v. Griffith* (2008) 162 Cal.App.4th 950, 955-956, *Futuresat Industries Inc. v. Superior Court* (1992) 3 Cal.App.4th 155, 163;
- a dismissal following a plaintiff's violation of the compulsory cross-complaint rule, *Carroll v. Import Motors, Inc.* (1995) 33 Cal.App.4th 1429, 1437;

- a dismissal based on the absence of an alter ego relationship; *Pueblo Radiology Medical Group Inc. v. Gerlach* (2008) 163 Cal.App.4th 826, 828-829;
- a dismissal following plaintiff's failure to bring a case to trial within five years *Elms v. Builders Disbursements, Inc.* (1991) 232 Cal.App.3d 671, 674;
- and a dismissal for plaintiff's failure to serve a summons within three years, *Winick, supra,* 187 Cal.App3d at pp. 1506-1508.

In each case, as here, the trial court disposed of the entire action and left nothing more to decide. The instant appeal does not present a question akin to filing in the wrong department of the court, such as what occurred in *Estate of Drummond* (2007) 149 Cal.4th 46, 53, nor is this a case in which the plaintiff filed in the wrong court system, which is what occurred in *Idea Place Corp. v. Fried* (ND Cal 2005) 390 F.Supp2d 903. Finally, this is not a situation which plaintiff filed in the wrong tribunal, initiating litigation instead of arbitration. (*Lachkar v. Lachkar* (1986) 182 Cal.App.3d 641.)

Even if another action is pending in Guam, this discrete California case ended in respondent's favor, and the trial court acted well within its discretion by so concluding. In *Profit Concepts Management Inc. v. Griffith, supra,* 162 Cal.App.4th at 955-956, the court affirmed a fee award following a successful motion to quash and dismissal for lack of personal jurisdiction despite the fact that plaintiff's follow-on lawsuit in Oklahoma on the same contract was still pending. "The determination of which party is the prevailing party must be made without consideration of whether the plaintiff may refile the action after a motion to quash service is granted. The issue of final resolution should not depend on the plaintiff's possible *future* conduct. Prevailing party attorney fees should be awarded based on the contract language, the statutory language, and the fact of dismissal of the case, not on speculation." (*Id.* at p. 956, emphasis in original.)

Appellants claim that the trial also erred because GEDCA was not suing to enforce the terms of the continuing guaranty. Appellants are mistaken. Section 1717 overrides

and broadens the language of the continuing guaranty by mandating an award of fees whenever either party brings "any action on the contract" regardless of whether it is an action to enforce, rescind, or do anything else with respect to the guaranty. A fundamental purpose of section 1717 is to make contractual attorney's fee clauses reciprocal and applicable to the entire instrument. (See *Covenant Mutual Ins. Co. v. Young* (1986) 179 Cal.App.3d. 318, 323. "On a contract" receives a liberal construction to encompass any action involving a contract. (*Dell Merk, Inc. v. Franzia* (2005) 132 Cal.App.4th 443, 455.) "It is now settled that a party is entitled to attorney fees under section 1717 'even when the party prevails on grounds the contract is inapplicable, invalid, unenforceable or nonexistent, if the other party would have been entitled to attorney's fees had it prevailed.' [Citations.]" (*Hsu v. Abbara, supra,* 9 Cal.4th at p. 870.) The trial judge ruled on the merits and found that appellants were not entitled to any relief. The trial court acted properly in finding that GEDCA was the prevailing party and was entitled to attorney's fees under section 1717.

b. The trial court did not abuse its discretion in awarding fees of $57,209

Appellants claim the trial judge did not adequately differentiate between fees that were spent in connection with the guaranty as opposed to fees that were spent in connection with defending against appellants' three other claims against GEDCA. It appears the trial judge did differentiate when it cut the award in half. Rather than automatically accepting GEDCA's claim, the court reviewed the papers and deducted much of what GEDCA requested because some of GEDCA's counsel's time was excessive or pertained to the declaratory relief cause of action. There was no abuse of discretion in setting the amount of the fee award.

DISPOSITION

The judgment (order sustaining the demurrers without leave to amend and order awarding attorney's fees) is affirmed. Respondents shall have costs on appeal.

MOHR, J. *

I concur:

FLIER, J.

I concur in the judgment.

RUBIN, Acting P. J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.